Supreme Court, U.S.
FILED

05-221 APR 15 2005

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JEAN-RONY JUPTER, A/K/A JEAN R. JUPITER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FIRST CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

JEAN-RONY JUPITER
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QUESTIONS PRESENTED

A. Did the United States Court of Appeals commit error otherwise act arbitrarily or capriciously in determining that "exceptional circumstances" did not exist which prevented or otherwise explained my failure to leave pursuant to grant of Voluntary Departure, issued by the Immigration Court on July 29,1998?

B. Are there any other circumstances which would indicate that the United States Court of Appeals did not appropriately exercise its sound discretion to direct the Broad of Immigration appeals to reopen my case?

I. As the First Circuit Court of Appeals opted to focus not on the merits of excludability in my petition, but, rather, on the IJ's decision to deny the motion to reopen, should the excludability be adequately addressed?

II. Should the voluntary departure deadline be equitably tolled?

LIST OF INTERESTED PARTIES

There are no additional interested parties.

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COMES NOW I, JEAN RONY JUPITER, THE PETITIONER WHO SUBMITS THIS BRIEF IN SUPPORT OF MY CONTENTION THAT THE UNITED STATES COURT OF APPEALS ERRED DENYING MY PETITION FOR JUDICIAL REVIEW, FILED IN MAY 20, 2004. SEE APPENDIX A.

OPINIONS BELOW

The Board of Immigration Appeals decided the case by unpublished written order (Appendix B). The First Circuit Court of Appeals issued an opinion that was not published (Appendix A).

STATEMENT OF JURISDICTION

I, Jean Rony Jupiter, petitioner raise before the Court the possibility that my voluntary departure deadline should be equitably tolled. The First Circuit Court of Appeals lacks jurisdiction to consider this contention. See Makhoul, 387 F.3d at 80; Sousa, 226 F.3d at 31-32; see also 8 U.S.C. § 1252(d)(1).

The First Circuit Court of Appeals entered its decision on February 8, 2005. Initial appeal to the Supreme Court was postmarked April 15, 2005, received April 19, 2005 and failed to comply with the Rules of the Court. The petition in corrected form is now being submitted in timely fashion within 60 days of the date of the reply from the Office of the Clerk of the Supreme Court of the United States.

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1252(d)(1) "A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right."

STATEMENT OF THE CASE

(a) Course Proceedings & Disposition of the Case Below

In 1995, I, a Haitian national, entered the United States and became a resident of the Virgin Islands and applied for asylum. (Appendix C) Two years later, the Immigration and Naturalization Service (INS) instituted a removal proceeding.[1]

One week before the scheduled hearing, the my attorney, Warren M. Williams, informed the immigration court that I wished to withdraw my asylum application and to effect a voluntary departure from the United States within the next four months. (See Appendix D) At the subsequent hearing, I appeared alongside several other similarly situated aliens, each of whom had made an identical proposal. The Immigration Judge (IJ) granted the requests and allowed me to depart voluntarily from the United States on or before November 30, 1998.

I retained a new attorney, Vincent A. Fuller, Jr. On September 25, 1998, my attorney moved to reopen my removal proceeding. In an affidavit filed in support of this motion, my petition claimed that my original lawyer had failed to advise me fully about my rights. (Appendix E)

The IJ denied the motion "without prejudice," noting that I had "failed to comply" with the procedural requirements attendant to the filing of a motion to reopen premised on

ineffectiveness of counsel. (Appendix F) See Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA) (explaining that an alien moving to reopen on the ground of ineffective assistance of counsel must, inter alia, provide his former attorney with notice and an opportunity to respond), review denied, 857 F.2d 10 (1st Cir. 1988). The denial of the motion to reopen took place on October 21, 1998 (slightly over one month before the voluntary departure deadline). About which, I was *not* notified. Believing my motion still pending, I remained in the United States and not capriciously.

I met my now wife in May of 1998, was engaged in September 1998 and married in August 1999. (Appendix G) Upon my arrival in Atlanta (September 1998) I contacted the INS to notify them of my relocation. In May of 2000, our son was born. (Appendix H)

In 1999, my wife filed an I-130 "immediate relative" petition in an attempt to lay the groundwork for adjusting my status to that of a lawful permanent resident (LPR). If the LPR had no grounds based on the previous decision of the INS, why then did the INS not act or respond until I, after waiting the required 30-month time frame, went into the Atlanta office on what I believed to be a formality to the affirmative conclusion of the LPR. It was not until 2002 that the INS accepted that petition for immediate relative. (Appendix I) It was also at that time, that the INS placed me on an Order of Supervision due to its previous decision in my case, this my first communication on its resolution. I secured counsel and on January 13, 2003, I filed a what I believed to be a just motion to reopen (Appendix J) my removal proceeding and proposed reopening my case in order to permit me to file a change of status application premised upon my marriage. In the body of the motion, my counsel asseverated that exceptional circumstances had prevented me from complying with the voluntary departure deadline. Those circumstances were

twofold: (i) Fuller had never informed me of the denial of my first motion to reopen, and I had assumed that its pendency meant that I should remain in the United States until settled; and (ii) human rights violations in Haiti were sufficiently pervasive to warrant non-enforcement of the removal order. [2]

In a terse handwritten order, the IJ denied the motion. The order limned two grounds: (i) this was my second motion to reopen; and (ii) reopening would be futile because I had overstayed my voluntary departure date and, summarily, was barred from readjusting my status. (Appendix K) Again, circumstance beyond my control predisposed my voluntary departure.

A timely appeal was made to the BIA. In it, my counsel explained the course of circumstance that lead to the resulting overstay. The BIA affirmed without opinion on April 21, 2004. This petition for judicial review followed. (Appendix B)

The abuse of discretion standard governs judicial review of the denial of a motion to reopen, regardless of the substantive claim involved. See INS v. Doherty, 502 U.S. 314, 323 (1992). The First Circuit Court of Appeals focused not on the merits of excludability, but, rather, on the IJ's decision to deny the motion to reopen. Carter v. INS, 90 F.3d 14, 16-17 (1st Cir. 1996). I pray the court examines the merits of excludability see 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right.").

It would also seem that Due Process is at issue. The granting of the MTR would have allowed me to be heard on my exceptional circumstance and in denying it the IJ deprived me of the constitutional right to due process. According to the law, there is cognizable liberty or property interest at stake. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). This

cannot be proven it I cannot be heard.

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1. The Homeland Security Act of 2002, Pub. L. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291(a)), abolished the INS and transferred many of its duties to the Department of Homeland Security. See Lattab v. Ashcroft, 384 F.3d 8, 13 n.2 (1st Cir. 2004).

2. The motion papers assert that I was entitled to relief under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. 105-277, div. A, sec. 101(h), § 901 et seq., 112 Stat. 2681, 2681-538 to -542. Conditions in my native land have changed materially. 8 C.F.R. § 1003.23(b)(4)(i).

(b) STATEMENT OF FACTS

I entered the United States from Haiti in 1995. In January 1997 I requested asylum and a withholding of deportation, and filed the appropriate relief application. At the time, and at this time, Haiti was and still in political turmoil, and I knew I was going to be persecuted on the basis of my political associations. My counsel, Warren Williams, hastily withdrew my request for relief in open court and via letter on my behalf and three of Mr. Williams' other clients. By agreement with counsel and the government, a Voluntary Departure Order was entered giving me four months to voluntarily, and at my own expense, depart the United States. I was not told that failure to do so would place me in default with serious consequences for future immigration benefit, including later adjustment to status as a lawful permanent Resident (LPR). I was not adequately prepared, advised, or otherwise cognizant of the arrangement regarding Voluntary Departure and its significance for my case. Had I been adequately prepared, advised, or informed I would not have agreed with this disposition without some hearing on the merits of my asylum /withholding application. A deadline for submitting additional evidence to supplement my claim had already passed or was otherwise ignored by my counsel. I left the courtroom confused about what had occurred. See (Appendices C and D)

I was wholly unsatisfied with the representation and prosecution of my application, and the unlikely outcome. I was particularly concerned that I did not have opportunity to present my case for asylum and withholding, and the perfunctory manner in which I and the other clients were presented to the Court. I sought other counsel, who filed a motion to reopen. (Appendix E) (Motion to Waive fee and Reopen and Affidavit in support thereof).

This Motion to Reopen was denied on October 21, 1998. A copy of the ruling is enclosed as Appendix F. The denial of that motion was attributable in significant part to an apparent failure to follow the procedures spelled out by the Board of Immigration Appeals in Matter of LOZADA 19 I and Dec 637 [BIA 1998]. The denial of that motion was without prejudice, subject to permissive refilling upon compliance with LOZADA. I was never notified by my new counsel that the motion had been denied, or for what reason, and my second counsel had the means to contact me and notify me accordingly. Needless to say, I had significant problems up to this point, with those retained to represent me.

Numerous "exceptional circumstances" occurred subsequent to the immigration proceeding in Puerto Rico. I met, and began to date with Tracy Briggs, an American citizen; May 1998, an order of voluntary departure was issued; July 1998, an appeal was entered re: the voluntary departure; September 1998, Tracy and I were engaged; August 1999, we were married. The Certificate of Marriage is enclosed as Appendix G. In September 1999, my wife entered documents to adjust my status based on our marriage and began the 30 months waiting period. April 2002, we went to the office of the INS to complete the formality of my permanent residency. At that time I was placed under an order of Supervision vs. being detained due to the fact that I had overstayed the voluntary departure order. I was never apprised of the final order to depart by my legal counsel. April 2002, I secured legal counsel who immediately sought to have my case reopened with the INS office with jurisdiction over my case. They replied in March 2003 in the negative and further barred me from ever adjusting my status in the United States believing that I deliberately overstayed my departure date of November 1998. April 2003 the process was escalated to the Broad of Immigration Appeals (BIA).

September 2003, we relocate (with permission from INS) from Atlanta to Northern Virginia based on promotion from my wife's employer. In October 2003, I secured new legal counsel who developed a brief that went before the 1st Circuit Court of Appeals of the United States asking that my case be reopened.

February 2005, the Federal Appeals Court denied the petition to reopen my case. My wife has networked, sent – multiple letters to senators and congressman at the state and US level and even the President. She has sought the counsel of many in the legal profession; And yet, we remain in this tenuous position of having our family permanently separated due to what seems my eminent deportation to Haiti.

REASONS FOR GRANTING THE WRIT

And so, we now come seeking the Supreme Court's support. In my estimation I am guilty of ignorance. Though ignorance of the law is no excuse, it may well be the basis of further review and appeals. It is our prayer that the Supreme Court would first dismiss this case and grant me adjusted status to permanent resident. I am no criminal and no financial drain to this society. I have worked my way up from server to management with my employer. I am a hardworking, church - going , tax-paying, soccer-coaching, family man. I cannot understand the why this country would break up an intact family. In fact my deportation would only bring about the very antithesis of what America stands for. As a proud American citizen to be, and moreover as a husband and a father, I implore those with decision-making authority to intercede and save my family.

On December 23, 1997 the Clinton Administration invoked the Doctrine of Deferred departure (DED), which deferred the removal of certain Haitian Nationals who had migrated to the US soil in recognition of the deplorable political situation in Haiti. One of the requirements of that Act was to have filled out an asylum application before December 31, 1995. My application was filed in 1997, but this term in which to depart the US voluntarily concluded after the expiration of the term for DED applicants, and subsequent extension, September 30, 2000 I had heard of and was aware of DED, and the general belief in the Haitian community was that it amounted to something of a blanket "official pardon"for many Haitians already here.

Similarly, on October 21, 1998 the Haitians Refugee Immigration Fairness Act became law. This Act made it much easier for Haitians here to claim refugee status and adjust status to that of lawful permanent Resident.

While all of this was pending, I relocated to Atlanta. As I said before, my wife filed an I-130 petition, which provides for eventual adjustment of status to me who has benefited from marriage to an American citizen. See approved petition notice Appendix I. May 2000, our son was born. See Appendix H. I had provided my counsel with any or all new addresses, and instruction regarding my wishes to remain in the US. My wife's relative petition was approved on December 22, 2002 and the required interview was schedule. The INS, with Alien number at all times at hand in the relative petition process, did not notify me of any problem with my application for adjustment to LPR until very late in the process.

The Deportation Office interrupted my interview and advised me that since I had not voluntarily departed on or before November 29, 1998, I was barred from seeking adjustment of status and was placed under an Order of Supervision. I have married, started a new life and family, and had logically and reasonably thought that I was entitled to adjustment of my status and I had done everything required under the law.

I then sought the services of an Atlanta based immigration counsel, who filed a Motion to Reopen (Appendix J) my case in Puerto Rico. That Motion alleged, inter alia, that there were exceptional circumstances why I did not and could not comply with the Order of July 29, 1998.

In a barely readable opinion, it appears the Judge denied this Motion because it was my second attempt to reopen my case and moreover that I had not complied with the terms of the Voluntary Departure Order. See Appendix K. That denial was promptly appealed to the Board of Immigration Appeals, which denied the appeal without explanation. This is where this Court stands today.

EXCEPTIONAL CIRCUMSTANCE

The Court should find that "exceptional circumstances" existed which prevented me from voluntarily departing, pursuant to the Immigration Court Order of July 29,1998.

Case law has long recognized that certain facts, conditions and other factors outside of the control of aliens may prevent their compliance with voluntary departure order. See Varela v .INS 204 F3rd 1237 (9th Cir. 2000). CF matter of G-Y-R, 23 I and N Dec 181 (BIA 2001)." Exceptional circumstances "can be constructed of a single or numerous causes. "Voluntarily" is defined as "proceeding from will or one' s own choice or consent", unconstrained by interference " or done by "design or intention ". INA section 240 B (d). Denial of counsel and right to present evidence has been help to be an exceptional circumstance in that it is a clear denial or due process. See Batanic v INS 12 F3rd 662, 667 (7th Cir.1993.ineffective assistance of counsel has been help to be an "exceptional circumstance" Lopez v INS, 184 F3rd 1097 (9th cir.1999). See also Castillo Perez v INS, 212 F3 rd 518 (9th Cir 2000).

It is hard to begin where and often in my self particulars "exceptional circumstances" apply. We can begin with the fact that I felt so aggrieved by the proceeding in which the voluntary Departure Order was entered on July 29, 1998 that I immediately sought new counsel. Evidence in the record consisting of a letter from my first counsel to the Immigration Court summarily disposing of four cases at once. Each one of us apparently had an identical disposition. Such a strategy would certainly implicate an absence of requisite diligence or care of counsel. Multiple clients, each with of us with difference fact and circumstances, had to be distinguishable cases. I insisted, by affidavit, that I was ill advised regarding any agreement by counsel with the

government. My next counsel did not comply with the requirements of LOZADA, to fulfill the procedurals tenets behind a Motion to Reopen, and furthermore did not advise me that it was denied. Believing my motion was still pending, this sanguine me, unversed in the arcane aspects of immigration law, proceeded with my life. The Haitian community was similarly immersed in talk of the apparent "amnesty "presented by Deferred Enforced Departure and the Haitian Refugee Immigration Fairness Act of 1998. My wife had filed a relative petition, which was approved in 2002 after more than 30 months of waiting. At no point was any response or correspondence received by me regarding my status, or its endangerment by the INS. At no point did I ever receive a letter from my previous counsel(s) advising me of any change or consequence involving my status.

While subsequent counsel did not comply with LOZADA requirements, even Valera recognizes that LOZADA, in and of itself, is not necessarily the prerequisite to reopening a case. See Valera 204 F3rd at 1240.

Each petitioner for immigration benefit is also afforded basic "notice" as a requisite for due process. USCA Constitutional Amendment 5. Notice to me is clearly lacking at every stage in my case."Notice" is clearly abrogated when all the evidence suggests that I help a mistaken belief regarding my status. Every action I took, from relocating to Atlanta, marrying, starting a family, indicated a lack of notice of process, so that I could properly and lawfully act. If I had been aware that I was required to leave on November 29,1998, four months the Order, I would have responded appropriately. In the alternative, if I was of the mistaken belief that the proceeding were at a higher level and I simply would wait until further notice from the INS or counsel, I would have immediately taken appropriate action upon receipt of the appropriate notice. Ironically, contemporaneously with the

date I was to have " voluntarily departed ", the Clinton Administration's HRIFA provisions were effect .The basic for these regulations was the recognition that it was virtually impossible for the Haitians present in the US, seeking refugee status, to be practically returned to Haiti. It was also likely, with the recognized turmoil in Haiti, physically impossible for me to return to Haiti as required by the Order of July 29,1998.

Under the principle espoused in re-Mario Eduardo Velarde Pacheco, 231 I and N Dec 253 (BIA 2002), a respondent me Jean Rony Jupiter in proceeding can adjust status to that of lawful permanent Resident pursuant to marriage to a citizen wife. Furthermore, the Court must take into account that it was likely impossible for me to comply with the July 29, 1998 order, based on my country conditions. In 2002, I lost my brother at age of 26 based on political unrest in Haiti.

Valera similarly stands for the proposition of "equitable tolling ", which is read into every federal statute of limitation. 204 F3rd 1237, (9th Cir .2000), citing Holmberg v Armbrecht 327 US 393 (1946). This Court, in addition to the many "exceptional circumstances" outlined above, may wish to apply a similar equitable principle in the case at hand. Clearly, there are so many "exceptional circumstances" in my case to explain the fact that I did not depart. There are so many equities involving me, my citizen wife, my citizen child, and the fact that I am not a criminal other than innocent ignorance, and inadvertent noncompliance with the July 29, 1998 order. Equity, fairness, and justice must prevail in my case and my wife, my son and I ask the Supreme Court to act accordingly.

CONCLUSION

Wherefore, in light of the previous, it is respectfully requested that this Court remand this matter back to United States Court of Appeals, with a directive that the matter be reopened, with a directive that to me comply with all Broad requirements for such motion, including but not limited to LOZADA style procedures. It is requested that the Court on its own directive reopen my case and remand it to the appropriate agency or Court for further action on the pending relative and approved petition, and any or other relief that appears to be just and appropriate.

Respectfully submitted,

Jean Rony Jupiter, Petitioner
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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AND FILED FEBRUARY 8, 2005

United States Court of Appeals

For the First Circuit

No. 04-1649

JEAN-RONY JUPITER, A/K/A JEAN R. JUPITER,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

Before

Boudin, Chief Judge,

Torruella and Selya, Circuit Judges.

Raymond Kline on brief for petitioner.

Peter D. Keisler, Assistant Attorney General, Civil Division, Christopher C. Fuller, Senior Litigation Counsel, and William C. Minick, Attorney, Office of Immigration Litigation, on brief for respondent.

Appendix A

SELYA, Circuit Judge. The petitioner, Jean-Rony Jupiter, seeks review of a final order of the Board of Immigration Appeals (BIA) denying his second motion to reopen his removal proceeding. His petition founders on procedural shoals.

The facts are straightforward. In 1995, the petitioner, a Haitian national, entered the United States illegally and became a resident of the Virgin Islands. Two years later, the Immigration and Naturalization Service (INS) instituted a removal proceeding. [1] At that point, the petitioner cross-applied for asylum.

One week before the scheduled hearing, the petitioner's attorney, Warren M. Williams, informed the immigration court that the petitioner wished to withdraw his asylum application and to effect a voluntary departure from the United States within the next four months. At the subsequent hearing, the petitioner appeared alongside several other similarly situated aliens, each of whom had made an identical proposal. The Immigration Judge (IJ) granted the requests and allowed the petitioner to depart voluntarily from the United States on or before November 30, 1998.

In short order, the petitioner retained a new attorney, Vincent A. Fuller, Jr. On September 25, 1998, he moved to reopen his removal proceeding. In an affidavit filed in support of this motion, he claimed that his original lawyer had failed to advise him fully about his rights.

The IJ denied the motion "without prejudice," noting that the petitioner had "failed to comply" with the procedural requirements attendant to the filing of a motion to reopen premised on ineffectiveness of counsel. See Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA) (explaining that an alien

moving to reopen on the ground of ineffective assistance of counsel must, inter alia, provide his former attorney with notice and an opportunity to respond), review denied, 857 F.2d 10 (1st Cir. 1988). The denial of the motion to reopen took place on October 21, 1998 (slightly over one month before the voluntary departure deadline).

The petitioner did not depart within the allotted period. He remained in the United States, moved to Atlanta (without notifying the INS), married an American citizen, and fathered a child.

In 1999, the petitioner's wife filed an I-130 "immediate relative" petition in an attempt to lay the groundwork for adjusting the petitioner's status to that of a lawful permanent resident. The INS accepted that petition in 2002. On January 13, 2003, the petitioner, through yet another attorney, filed a second motion to reopen his removal proceeding. [2] He proposed reopening in order to permit him to file a change of status application premised upon his marriage. In the body of the motion, his counsel asseverated that exceptional circumstances had prevented the petitioner from complying with the voluntary departure deadline. Those circumstances were twofold: (i) Fuller had never informed the petitioner of the denial of his first motion to reopen, and the petitioner had assumed that its pendency entitled him to remain in the United States; and (ii) human rights violations in Haiti were sufficiently pervasive to warrant non-enforcement of the removal order. [3] In a terse handwritten order, the IJ denied the petitioner's motion. The order limned two independently sufficient grounds: (i) this was the petitioner's second motion to reopen; and (ii) reopening would be futile because the petitioner had overstayed his voluntary departure date and, accordingly, was barred from readjusting his status. The IJ did

not comment on the fact that the motion apparently had been filed out of time. See 8 C.F.R. § 1003.23(a)(1) (ordaining that a motion to reopen must be filed within ninety days of the date of entry of a final administrative order).

The petitioner took a timely appeal to the BIA. He did not address the first ground relied on by the IJ and only obliquely attempted to counter the second ground. Instead, he reiterated the same claims he had made in his second motion to reopen. The BIA affirmed without opinion on April 21, 2004. This petition for judicial review followed.

The abuse of discretion standard governs judicial review of the denial of a motion to reopen, regardless of the substantive claim involved. See INS v. Doherty, 502 U.S. 314, 323 (1992). Where, as here, the BIA has employed its streamlined "affirmance without opinion" procedure, see 8 C.F.R. § 1003.1(e)(4), we review directly the IJ's decision as if it were the decision of the BIA. See Keo v. Ashcroft, 341 F.3d 57, 60 (1st Cir. 2003); El Moraghy v. Ashcroft, 331 F.3d 195, 203 (1st Cir. 2003). In so doing, we focus not on the merits of the petitioner's excludability, but, rather, on the IJ's decision to deny the motion to reopen. Carter v. INS, 90 F.3d 14, 16-17 (1st Cir. 1996). Here, then, we proceed to examine the two grounds underpinning the IJ's order.

The first ground is that the petitioner's motion was a second motion to reopen and, thus, numerically barred. The applicable regulation places a numerical ceiling of one on the number of motions to reopen that a party may file before an IJ. See 8 C.F.R. § 1003.23(b)(1) (stating that "a party may file only . . . one motion to reopen proceedings"). [4] The petitioner has never disputed that his January 13, 2003 motion to reopen was numerically barred under this regulation (after all, he had filed a previous motion to reopen on September 25, 1998).

Moreover, the petitioner utterly failed to challenge this finding on appeal to the BIA. Consequently, the IJ's determination that the petitioner's second motion to reopen was numerically barred by 8 C.F.R. § 1003.23(b)(1) has become final and unreviewable. See Makhoul v. Ashcroft, 387 F.3d 75, 80 (1st Cir. 2004) (explaining that theories not advanced before the BIA may not be surfaced for the first time in a petition for judicial review); Sousa v. INS, 226 F.3d 28, 31-32 (1st Cir. 2000) (similar); see also 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right."). [5]

The IJ's alternative basis for denying the petitioner's second motion to reopen posited that the motion was futile because the petitioner's non-observance of the voluntary departure deadline rendered him ineligible for the relief ultimately sought. The applicable statute provides in pertinent part:

If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be . . . ineligible for a period of 10 years for any further relief under this section and sections 1229b, 1255 [adjustment of status], 1258, and 1259 of this title.

8 U.S.C. § 1229c(d). The petitioner falls squarely within the plain language of this statute and, thus, the IJ supportably found the petitioner statutorily ineligible for adjustment of status because of his earlier failure to adhere to the voluntary departure deadline.

Appendix A

The petitioner attempts to confess and avoid. He admits that he did not depart within the allotted period but asserts that exceptional circumstances excused his decision to ignore the deadline. The principal circumstance to which he adverts is that Fuller, his counsel at the time, neglected to notify him when his first motion to reopen was denied.

Assuming, for argument's sake, that exceptional circumstances might justify the granting of a second motion to reopen and that a failure to reopen in the face of exceptional circumstances would be judicially reviewable, the petitioner's claim is nonetheless empty. There is simply no evidence in the record that the petitioner did not receive notice of the denial. His second motion to reopen was unaccompanied by an affidavit or sworn statement attesting to the facts as represented by his counsel in the body of the motion (counsel represented, without record support, that the petitioner was "unaware" that the IJ had denied his prior motion to reopen and so, "[b]elieving that his case was still pending . . . remained in the United States beyond the voluntary departure deadline"). Counsel's factual assertions in pleadings or legal memoranda are not evidence and do not establish material facts. See, e.g., Corrada Betances v. Sea-Land Serv., Inc., 248 F.3d 40, 43 (1st Cir. 2001); United States v. Fetlow, 21 F.3d 243, 248 (8th Cir. 1994); cf. 8 C.F.R. § 1003.23(b)(3) (providing in general that motions to reopen addressed to an IJ "shall be supported by affidavits and other evidentiary material"). This failure to establish a lack of notice undermines the petitioner's claim.

At any rate, the claim is bootless. Even if the petitioner believed that his motion to reopen had never been adjudicated, he would not be eligible for relief. The fact that an unadjudicated motion is pending does not constitute an

exceptional circumstance sufficient to blunt the force of section 1229c(d) and excuse a failure to depart voluntarily pursuant to an existing order. See, e.g., Mardones v. McElroy, 197 F.3d 619, 624 (2d Cir. 1999); Stewart v. INS, 181 F.3d 587, 596 (4th Cir. 1999); Shaar v. INS, 141 F.3d 953, 957 (9th Cir. 1998). To satisfy the "exceptional circumstances" requirement, an alien must show that he was unable to comply with the departure deadline. Mardones, 197 F.3d at 624. There was nothing of legal significance that prevented the petitioner from departing by November 30, 1998; at best, he simply took it upon himself to stay in the United States while awaiting the outcome of his motion to reopen. So viewed, the record adequately evinces that the petitioner was unwilling, rather than unable, to depart. Thus, the IJ did not abuse her discretion in denying the petitioner's second motion to reopen on the alternative ground that the petitioner was statutorily ineligible for adjustment of status.

There is one final point. The petitioner attempts to salvage matters by invoking the Due Process Clause. He argues that by failing to extend the voluntary departure deadline, the IJ deprived him of his constitutional right to due process.

To be sure, this claim was not raised below. Still, an asserted denial of due process may, in certain limited circumstances, be exempt from the ordinary exhaustion requirement. See, e.g., Ravindran v. INS, 976 F.2d 754, 762 (1st Cir. 1992). These circumstances are rare and are restricted to claims that are beyond the authority of the agency to adjudicate. See id. For purposes of this case, however, we need not probe that procedural point too deeply. Even assuming, for argument's sake, that we have jurisdiction to review such a claim, the record in this case is devoid of any sufficient factual support for it.

The petitioner's purported due process claim is nothing more than a reformulated attack on the IJ's discretionary refusal to extend the voluntary departure deadline after the fact (or, more precisely put, to overlook the petitioner's violation of that deadline). That reframed attack presents no substantial constitutional question. See, e.g., Bernal-Vallejo v. INS, 195 F.3d 56, 63 (1st Cir. 1999).

In all events, the petitioner cannot premise a colorable due process claim solely on the denial of an opportunity to depart later. For due process to attach, there must be a cognizable liberty or property interest at stake. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). None exists here. "Adjustment of status is not an entitlement," but, rather, a matter of administrative discretion. Henry v. INS, 74 F.3d 1, 7 (1st Cir. 1996); see also INS v. Abudu, 485 U.S. 94, 105 (1988). So too voluntary departure, which is a privilege, not a right. See Tamas-Mercea v. Reno, 222 F.3d 417, 427 (7th Cir. 2000); see also 8 U.S.C. § 1229c(f) (depriving federal courts of appellate jurisdiction over denials of voluntary departure). There is no property interest involved and, because the relief of voluntary departure (like the relief of adjustment of status) is essentially discretionary, there is no cognizable liberty interest in that remedy. See Ali v. Ashcroft, 366 F.3d 407, 412 (6th Cir. 2004) (explaining that an IJ's failure to grant voluntary departure does not involve a deprivation of a petitioner's liberty interest); see also Finlay v. INS, 210 F.3d 556, 557 (5th Cir. 2000) (explaining that "the denial of discretionary relief does not rise to the level of a constitutional violation, even if [the alien] had been eligible for it") (citations omitted).

We need go no further. [6] For the reasons set forth above, the petition for judicial review must be denied.

Appendix A

So Ordered.

1. The Homeland Security Act of 2002, Pub. L. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291(a)), abolished the INS and transferred many of its duties to the Department of Homeland Security. See Lattab v. Ashcroft, 384 F.3d 8, 13 n.2 (1st Cir. 2004).

2. The petitioner has eschewed any argument that this motion was not a second motion because the IJ had denied his first motion to reopen "without prejudice." In all events, that argument would not wash. The petitioner waited over four years before filing his second motion to reopen. That motion made no attempt either to remedy the Lozada defects that prompted the denial of his original motion or to reallege the claim of ineffective assistance of counsel. Instead, his new motion totally abandoned the ineffective assistance claim in favor of a wholly different legal theory premised on entirely different facts. If the IJ's order in response to the petitioner's first motion to reopen left open the possibility of a second motion -- a matter on which we take no view -- it did so only "insomuch as [the petitioner] failed to comply with . . . Lozada." The IJ's use of the phrase "without prejudice" did not give the petitioner an open-ended ticket to challenge the order of removal at any future time and on any conceivable grounds.

3. As to the latter circumstance, the motion papers intimated that the petitioner was entitled to relief under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. 105-277, div. A, sec. 101(h), § 901 et seq., 112 Stat. 2681, 2681-538 to -542. This proved to be a red herring, and the petitioner subsequently abandoned the HRIFA claim. Although we need not deal with it here, we note that the petitioner plainly does not satisfy HRIFA's eligibility criteria. See id. § 902(b)(1), 112 Stat. at 2681-538 (conditioning eligibility for special prophylaxis on, inter alia, an alien's having been paroled into the United States or having applied for asylum before December 31, 1995).

4. This limitation may be relaxed if a petitioner can show either that conditions in his native land have changed materially or that the underlying order of removal was entered in absentia because of the petitioner's inability to appear. 8 C.F.R. § 1003.23(b)(4)(i-ii). The petitioner makes no developed argument that either of these exceptions applies in this case. The regulations provide no grounds for relief based on changes in a petitioner's marital status or domestic circumstances.

Appendix A

5. At the expense of carting coal to Newcastle, we add that the petitioner has also waived this point by neglecting to raise it in his opening brief to this court. See, e.g., Mediouni v. INS, 314 F.3d 24, 28 n.5 (1st Cir. 2002); Sandstrom v. ChemLawn Corp., 904 F.2d 83, 89 n.6 (1st Cir. 1990).

6. For the first time, the petitioner raises before us the possibility that his voluntary departure deadline should be equitably tolled. We lack jurisdiction to consider this previously unraised contention. See Makhoul, 387 F.3d at 80; Sousa, 226 F.3d at 31-32; see also 8 U.S.C. § 1252(d)(1).

Appendix B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A75-356-069 - GUAYNABO

Date: APR 21 2004

In re: JUPITER, JEAN R.

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Abrahams, Valrie Y.

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2004 MAY -3 A 11:25

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FOR THE BOARD

Appendix C

LAW OFFICES
OF
WARREN M. WILLIAMS
ATTORNEY AND COUNSELOR AT LAW
[illegible]
CHARLOTTE AMALIE, ST. THOMAS, U.S. VIRGIN ISLANDS 00801
PHONE: (340) 774-7481

February 27, 1998

Office of the Immigration Judge
GSA Center 651 Pedreal Drive
Suite 111-14 Guyanabo Puerto Rico
00936

RE: A#75-346-015 Carole Pierre
A#75-356-069 Jean Jupiter
A#74-659-667 Agusma Polimord
A#75-346-093 Deline Aimessot

Dear Judge Lopez:

Enclosed please find four(4) Policital Asylum applications submitted on behalf of my clients.

Sincerely,

Warren M. Williams

WMW/md

Appendix D

LAW OFFICES
OF
WARREN M. WILLIAMS
ATTORNEY AND COUNSELOR AT LAW
[illegible]
CHARLOTTE AMALIE, ST. THOMAS, U.S. VIRGIN ISLANDS 00801
PHONE: (340) 774-7441

July 22, 1998

RECEIVED
DEPARTMENT OF JUSTICE
98 JUL 23 PM 4:18
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFF OF IMMIGRATION JUDGE

Office of the Immigration Judge
GAS Center, 651 Federal Drive
Suite 111-14, Guyanabo
Puerto Rico, 00965

Dear Juila:

Please advise Judge Lopez that after consultation with the below clients they have informed me that they will be withdrawing their petitions for Political Asylum.

Augusma Polinord A#74-659-667 - 7/30/98 - 10:00 (IC)

Alexis Louissaint A#75-346-098 - 7/28/98 - 1:00 (MASTER)

Marielle Maxi A#75-383-944 - 7/28/98 - 1:00 (MASTER)

Jean Jupiter 75-356-069 - 7/31/98 - 9:00 (IC)

Accordingly, they would be requesting from the court permission for voluntary Departure within four(4) months.

I am advising the court at this time in Order for the Court. if the court desires to reschedule my client's individual hearing time to another case.

Sincerely,

Warren M. Williams

WMW/md

Appendix E

BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE
EOIR
IMMIGRATION COURT
PUERTO RICO/VIRGIN ISLANDS

IN THE MATTER OF:
JEAN RONY JUPITER
A-754-356-069

DEPARTMENT OF JUSTICE
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OFFICE OF THE IMMIGRATION JUDGE

MOTION TO WAIVE FEE AND MOTION TO REOPEN

Comes now Applicant through counsel and moves this Court to waive the fee required by Title 8, C.F.R. Sec. 3.31, and to reopen the above captioned matter, and in support of this motion states as follows:

1. Applicant is currently represented by the undersigned. An executed G-28 is included herewith.

2. On July 29, 1998, Applicant appeared in Immigration Court before Judge Irma Lopez Defillo for his individual hearing. His attorney representative at the hearing and before was Attorney Warren Williams.

3. At the time of the hearing, Attorney Williams did not explain to Applicant his right to have a full individual hearing and to file an appeal of the decision of the Judge within 30 days if she denied his political asylum claim. Attorney Williams merely told him and some 10 other Haitians he represented how he was going to handle all of the cases. He said that the claims did not warrant the granting of asylum, and, therefore, he was going to ask the Judge to grant four months voluntary departure to Applicant and to the others. He provided no explanation, and, as noted above, did not advise us of Applicant or the others of their rights to go forward with individual hearings.

4. After this, Attorney Williams had Applicant and the entire group all appear in front of the Judge in a group and informed the Judge that he was asking for four months voluntary departure for each of them. Judge Lopez took all of these cases at the same time. At that time, in front of Judge Lopez, Applicant was reluctant to attempt to speak up and question what was happening or to object to the manner in which Attorney Williams handled his representation of Applicant.

5. Applicant believes Attorney Williams failed to adequately and properly represent him at the hearing and before, and to explain to him at the hearing, or at any time prior to the hearing, the options available to him and his rights. The facts appear to bear this out.

6. When Applicant initially retained Attorney Williams to represent him, and he appeared

with him at a master hearing on January 27, 1998. Judge Lopez gave Applicant 30 days to supplement his asylum application. Although Applicant appeared in Attorney Williams' office and provided information to him to be included in supplementing his asylum application, Attorney Williams failed to submit any supplement to his asylum application within the 30 days or at any time.

7. It would be a miscarriage of justice if the Applicant were deported under the circumstances related above.

For all of the above reasons, it is respectfully requested that the Court waive payment of the fee, and grant the Applicant's motion to reopen this matter.

Dated: September 25, 1998

Respectfully submitted,

Vincent A. Fuller, Jr.
Attorney for Respondent
51B Kongens Gade
P.O. Box 303300
St. Thomas, Virgin Islands 00803-3300
(340) 776-5700

Appendix K

AFFIDAVIT

TERRITORY OF THE VIRGIN ISLANDS)
) ss
DIVISION OF ST. THOMAS & ST. JOHN)

BEFORE ME, the undersigned authority, personally appeared JEAN RONY JUPITER, who after being duly sworn did depose and state:

1. I am JEAN RONY JUPITER, and my Alien Number is A75-356-069.

2. On July 29, 1998, I appeared in Immigration Court before Judge Irma Lopez Defillo for my individual hearing. My attorney representative at the hearing and before was Attorney Warren Williams.

3. At the time of the hearing, Attorney Williams did not explain to me my right to have a full individual hearing and to file an appeal of the decision of the Judge within 30 days if she denied my political asylum claim. Attorney Williams merely told me and some 10 other Haitians he represented how he was going to handle all of our cases. He said that our claims did not warrant the granting of asylum, and, therefore, he was going to ask the Judge to grant four months voluntary departure to me and to the others. He provided no explanation, and, as noted above, did not advise us of our rights to go forward with our individual hearings.

4. After this, Attorney Williams had us all appear in front of the Judge in a group and informed the Judge that he was asking for four months voluntary departure for each of us. Judge Lopez took all of these cases at the same time. At that time, in front of Judge Lopez, I was reluctant to attempt to speak up and question what was happening or to object to the manner in which Attorney Williams handled his representation of me.

5. I believe Attorney Williams failed to adequately and properly represent me at the hearing and before, and to explain to me at the hearing, or at any time prior to the hearing, the options available to me and my rights.

6. When I initially retained Attorney Williams to represent me, and he appeared with me at a master hearing on January 27, 1998, Judge Lopez gave me 30 days to supplement my asylum application. Although I appeared in Attorney Williams' office and provided information to him to be included in supplementing my asylum application, Attorney Williams failed to submit my supplement to my asylum application within the 30 days or at any time.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: September 25, 1998

Jean Rony Jacques

SUBSCRIBED AND SWORN to before me this 25th day of September, 1998.

Notary Public

VINCENT A. FULLER
COMMISSION EXPIRES 6/26/2002
NOTARY PUBLIC # LMP-17-98
ST. THOMAS VIRGIN ISLANDS

000081

Appendix F

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN JUAN, PUERTO RICO

IN THE MATTER OF:

Jupiter, Jean R.) CASE NO. 75-356-069
RESPONDENT/APPLICANT)

IN Removal) DECISION ON A MOTION
Vincent A. Fulka

VIVIAN REYES LOPEZ, D.C.

A Motion TO WAIVE FEE/Motion to Reopen has been filed in the above captioned case. The Motion has been duly considered and it appears to the Court that:

( ) The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be GRANTED.

( ) The Motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant its grant. Therefore, IT IS ORDERED that the Motion be and the same is hereby DENIED.

( ) Request is untimely; application was due on _____. Counsel should have filed in timely manner. However, an extension of time to file until _____ will be granted. No further extension will be approved.

( ) The prior order of _____, is hereby VACATED.

(*) The Court hereby note that the Alien has in fact paid the fee for the Motion to Reopen therefore the request to waive the fee is moot. Regarding Respondent's Motion to Reopen the same is hereby denied without prejudice inasmuch Respondent failed to comply with the procedure established in Matter of Lozada Int Dec 3059 (BIA 1988)

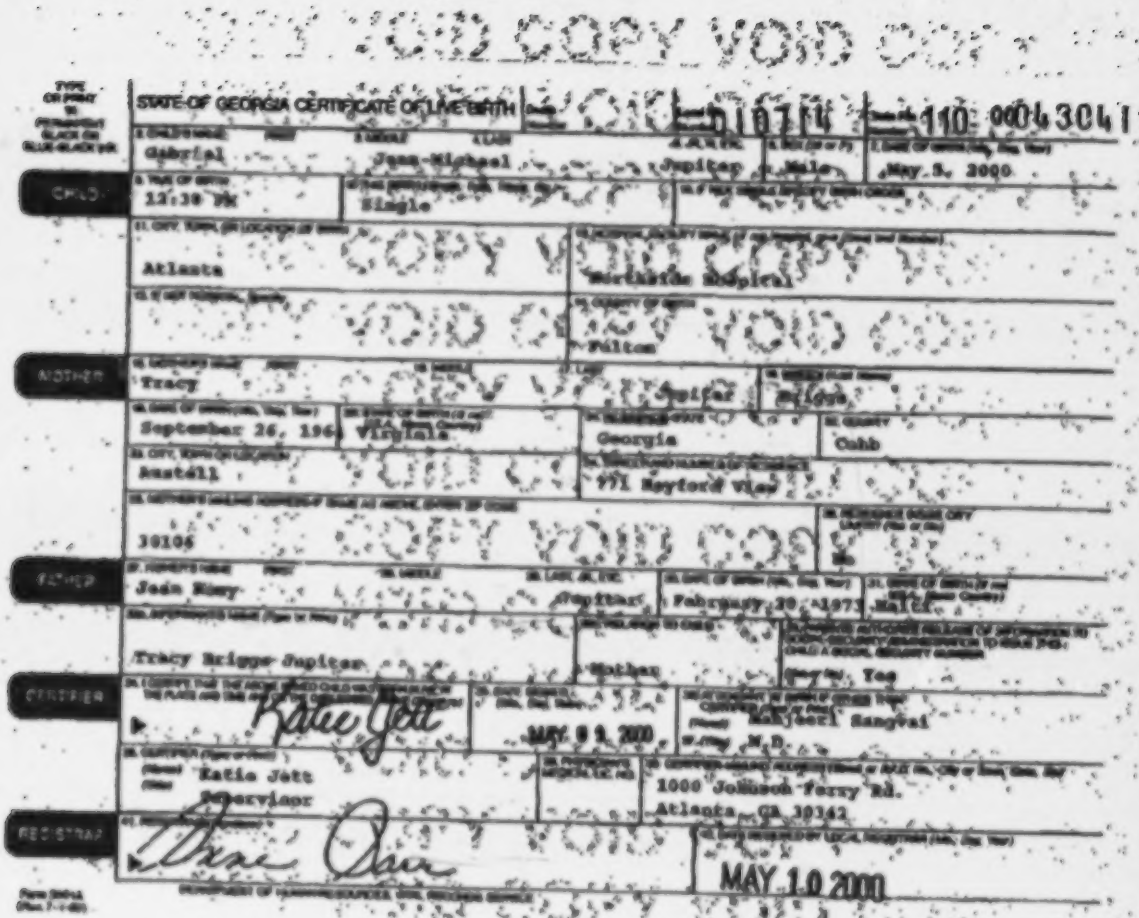
IRMA LOPEZ-DEFILLO
IMMIGRATION JUDGE

Dated signed: Oct 21, 98

cc: District Counsel
Counsel for Respondent/Applicant
Respondent/Applicant

Mailed out: 10/21/98 By: [illegible]

Appendix H



STATE OF GEORGIA CERTIFICATE OF LIVE BIRTH

110 0004 3041

CHILD

Gabriel — Jean-Michael — Jupiter — Male — May 5, 2000

12:38 PM — Single

Atlanta — Northside Hospital

Fulton

MOTHER

Tracy — Jupiter

September 26, 1969 — Virginia — Georgia — Cobb

Austell — 771 Keytord View

30106

FATHER

Jean Rimy — Jupiter — February 20, 1973 — Haiti

Tracy Briggs Jupiter — Mother — Yes

CERTIFIER

Katie Gott — MAY 9 2000 — Manjeet Sangwal, M.D.

Katie Gott — Supervisor — 1000 Johnson Ferry Rd. Atlanta, GA 30342

REGISTRAR

MAY 10 2000

Appendix I

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Atlanta District Office
77 Forsyth Street, SW
Atlanta, GA 30303

NOTICE OF APPROVAL OF RELATIVE IMMIGRANT VISA PETITION

NAME AND ADDRESS OF PETITIONER

Tracey Jupiter
771 Hayford View
Austell, GA 30106-1478

NAME OF BENEFICIARY	
Jean-Remy Jupiter	
CLASSIFICATION	FILE NO.
201(b)	A 75 316 069
DATE PETITION FILED	DATE OF APPROVAL OF PETITION
November 17, 1999	December 17, 2001

DATE: December 17, 2001

The visa petition you filed has been approved. The beneficiary for whom you filed has been given the appropriate classification. Note: the approval gives no assurance that the beneficiary will automatically be found eligible for visa issuance, admission to the United States or adjustment to lawful permanent residence status. Whether the beneficiary gets a visa is decided only when an application is made to a consular officer; whether the beneficiary is admitted or adjusts status in the United States is decided only when an application is made to an immigration officer.

1. ☒ YOUR PETITION TO CLASSIFY THE BENEFICIARY AS AN IMMEDIATE RELATIVE OF A UNITED STATES CITIZEN HAS BEEN FORWARDED TO THE UNITED STATES CONSULATE AT: SEE BELOW. THIS COMPLETES ALL ACTION BY THIS SERVICE ON THE PETITION. THE UNITED STATES CONSULATE, WHICH IS PART OF THE DEPARTMENT OF STATE, WILL CONTACT THE BENEFICIARY AND GIVE INSTRUCTIONS ABOUT GETTING A VISA. QUESTIONS ABOUT GETTING A VISA SHOULD BE MADE TO THE UNITED STATES CONSUL.

2. ☐ IF YOU BECOME A NATURALIZED CITIZEN OF THE UNITED STATES AND AN IMMIGRANT VISA HAS NOT YET BEEN ISSUED TO THE BENEFICIARY, NOTIFY THIS OFFICE IMMEDIATELY, GIVING THE DATE OF YOUR NATURALIZATION. IF THE PETITION WAS BY BEHALF OF YOUR SON OR DAUGHTER, PLEASE ADVISE WHETHER THAT PERSON IS STILL UNMARRIED. THIS INFORMATION MAY BE HELPFUL TO THE BENEFICIARY IN GETTING A VISA FASTER. PETITION FOR PREFERENCE CLASSIFICATION HAS BEEN FORWARDED TO THE UNITED STATES CONSULATE AT ____. THIS COMPLETES ALL ACTION BY THE SERVICE. THIS SERVICE DOES NOT ISSUE VISAS IN OTHER COUNTRIES. VISAS ARE ISSUED ONLY BY UNITED STATES CONSULS WHO ARE EMPLOYEES OF THE UNITED STATES DEPARTMENT OF STATE. WHEN THE BENEFICIARY'S TURN IS REACHED ON THE VISA WAITING LIST, THE UNITED STATES CONSUL WILL CONTACT THE BENEFICIARY AND GIVE INSTRUCTIONS ABOUT GETTING A VISA. VISAS ARE ISSUED ACCORDING TO THE DATE THE PETITION WAS FILED. QUESTIONS ABOUT GETTING A VISA SHOULD BE ADDRESSED TO THE UNITED STATES CONSUL.

4. ☐ YOUR PETITION SAYS THAT THE BENEFICIARY IS IN THE UNITED STATES AND WILL APPLY TO BECOME A LAWFUL PERMANENT RESIDENT. THE ENCLOSED APPLICATION (FORM I-485) SHOULD BE COMPLETED AND SUBMITTED BY THE BENEFICIARY WITHIN 30 DAYS. (IF THE BENEFICIARY PREVIOUSLY SUBMITTED SUCH AN APPLICATION AND HAD IT RETURNED, IT SHOULD BE RESUBMITTED WITHIN 30 DAYS.)

5. ☒ THE BENEFICIARY WILL BE INFORMED OF THE DECISION MADE ON THE PENDING APPLICATION TO BECOME A LAWFUL PERMANENT RESIDENT.

6. ☐ THE PETITION SAYS THAT THE BENEFICIARY IS IN THE UNITED STATES AND WILL APPLY TO BECOME A LAWFUL PERMANENT RESIDENT. THE BENEFICIARY MAY NOT APPLY TO BECOME A PERMANENT RESIDENT, HOWEVER, UNTIL A VISA NUMBER IS AVAILABLE. INFORMATION ABOUT VISA NUMBERS MAY BE OBTAINED FROM THE UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, WASHINGTON, D.C.

7. ☐ ORIGINAL DOCUMENTS SUBMITTED IN SUPPORT OF YOUR PETITION UNACCOMPANIED BY COPIES HAVE BEEN MADE PART OF THE PETITION. ANY OTHERS ARE BEING RETURNED WITH THIS FORM.

8. ☒ REMARKS.

PLEASE DIRECT ALL INQUIRIES TO THE ADDRESS LISTED BELOW AND REFERENCE THE FILE NUMBER, WHICH APPEARS IN THE BLOCKED AREA LOCATED AT THE TOP OF THE FORM.

NATIONAL VISA CENTER
33 ROCHESTER AVE
PORTSMOUTH, NH 03801

VERY TRULY YOURS,

ROSEMARY L MELVILLE
DISTRICT DIRECTOR

Appendix J

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the matter of.	)	
Jean-Rony JUPITER	)	
A 75-236-069	)	IN REMOVAL PROCEEDINGS
Docket: St. Thomas, Virgin Islands	)	
	)	
Respondent	)	
	)	

BOARD OF IMMIGRATION APPEALS OFFICE OF THE CLERK
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RECEIVED DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

RESPONDENT'S BRIEF IN SUPPORT OF HIS APPEAL TO THE IMMIGRATION JUDGE'S DENIAL OF HIS MOTION REOPEN HIS REMOVAL PROCEEDINGS AND HIS REQUEST FOR STAY OF HIS REMOVAL

The Respondent through his undersigned counsel, hereby moves the BOARD OF IMMIGRATION APPEALS to stay the execution of the Removal Order pending against him, as well as reopen removal proceedings against him in order to enable him to adjustment status to a permanent resident as the Respondent now has an approved I-130 relative petition.

Respondent is a citizen of Haiti who entered the United States on or about 1995. Respondent applied for Political Asylum at the INS office in St. Thomas, United States Virgin Islands.

Respondent was granted Voluntary Departure.VD, on July 29, 1998. Respondent was unaware of what his acceptance of VD meant and so through his, then, new counsel applied for a Motion to Reopen his case. Said Motion was denied on October 21, 1998. Respondent was unaware of this denial. Believing that his case was still pending, Respondent remained in the United States beyond the voluntary departure deadline.

Respondent now has a United States Citizen spouse and child. Respondent and his spouse presented evidence of a bona fide marriage to the Immigration and Naturalization Service, INS, in Atlanta, Georgia, which included but was not limited to:

1. Documentation showing ownership of property;
2. Deed showing joint tenancy of a common residence;
3. Documentation showing commingling of financial resources;
4. The birth certificate of the child born to the Respondent and his spouse attached as **Exhibit "A;"**.
5. The marriage certificate of the respondent and his spouse attached as **Exhibit "B;"**
6. Other evidence, which established to the satisfaction of the interviewing officer that the marriage was not entered into in order to evade the immigration laws of the United States.

An I-130 petition was therefore approved on their behalf on December 17, 2002, attached as **Exhibit "C."**

Respondent's FBI report established that he has never been arrested or convicted of a crime. *Respondent is of good moral character.*

Appendix J

Exceptional Circumstances:

Respondent asks that the court view the following issues as *exceptional circumstances* which prevented him from timely departing the United States:

1. Once Respondent realized he was ill advised on accepting voluntary departure, he timely filed a motion to reopen his case.
2. His attorney never informed him that his motion to reopen was denied and Respondent continued to believe that he could remain in the United States.
3. Respondent asks that the Court considers his country of birth as a hardship to his timely departure from the United States.

A check of the INS record with regards to Haiti and human right violations forcing individual to flee Haiti by any means possible, will reveal the following:

a. On December 23, 1997 the President of the United States granted Haitian nationals protection from removal from the United States until December 22, 1998. This was referred to as Deferred Enforced Departure (DED), see information attached as **Exhibit "D."** ***On July 29, 1998 Respondent was granted Voluntary Departure to a country the United States Government refused to deport individuals to, but instead deferred their departure.***

b. By October 21, 1998 the Haitian Refugee Immigration Fairness Act (HRIFA) was signed into law. HRIFA provided immigration benefits and relief from deportation to Haitian nationals. A May 11, 1999 INS News Release stated in part, ***"The Clinton Administration is committed to providing fair accessible procedures for adjustment of status for Haitians who suffered under an oppressive regime and came to the United States in the early 1990s..."***. HRIFA information is attached as **Exhibit "E."**

c. On December the 14, 1998 the INS extended DED for Haitian nationals until December 22, 1999, this information is attached as **Exhibit "F."**

d. On December the 17, 1999 the INS extended DED for Haitian nationals until September 30, 2000, this information is attached as **Exhibit "G."**

It is Respondent's contention that as a Haitian national who had filed political asylum and was continuously physically present in the United States from 1995, he was protected from removal from the United States under DED and then HRIFA, a year before DED ended.

By 1999 Respondent's spouse had filed for his adjustment of status to that of permanent resident. Thinking he was protected under his family petition he did not file for HRIFA.

Since departure was impossible, Respondent contends that like the Respondent in In re Mario Eduardo Velarde-Pacheco, 23I&N Dec. 253 (BIA 2002) he is eligible for adjustment of status. With an I-130 pending since 1999 respondent is also eligible for 245(i).

Based on the above, Respondent respectfully requests a grant for a stay of his Removal; that the Court grant him an exemption for not departing the United States due to DED from 1997 through the year 2000 and HRIFA and that his case be reopened to enable him to re-submit his application for adjustment of status with the INS in Atlanta, Georgia.

RESPECTFULLY submitted this 15th day of August 2003.

By: Valrie Y. Abrahams

HARRISTON SQUARE
5532-G OLD NATIONAL HWY.
SUITE 250-A
COLLEGE PARK, GA 30349
Phone: (404) 765-9966
Fax: (404) 765-0960

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EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

2003 AUG 18 P 3:08

BOARD OF
IMMIGRATION APPEALS
OFFICE OF THE CLERK

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF IN SUPPORT OF APPEAL was served on the Immigration and Naturalization Service by Federal Express mailed on August 15, 2003 for next day delivery to:

District Counsel

U.S. Immigration and naturalization Service

San Patricio Office Center

8th Tabonuco Street, Suite 1000

Guaynabo, Puerto Rico 00968

Dated this 15th day of August, 2003

Valrie Y. Abrahams

Appendix K

APR-10-2003 16:34 USDOJ/EOIR/013 P.02/03

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
47 TARONJOO STREET, ROOM 401
GUAYNABO, PR 00968-4805

In the Matter of:
JUPITER, JEAN E.

Case No.: A79-356-047

Docket: ST. THOMAS, VIRGIN ISLANDS

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's

( ) Motion to Reconsider an Immigration Judge's decision

(X) Motion to Reopen proceedings is Denied

filed in the above entitled matter, it is hereby ordered that the motion

( ) Be Granted

( ) Be Denied for reasons indicated in the attached decision

See attached

IMMIGRATION JUDGE
Date: March 10, 03

Appeal: WAIVED (A/C/R)
Appeal due By:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer ( ) Attorney/Rep/DOJ ( ) Other
DATE: 3/11/03 BY: COURT STAFF

Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Appeal Services List ( ) Other

Form EOIR 2 - ST
Rev. 6/

Appendix K

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN JUAN, PUERTO RICO

IN THE MATTER OF:
JUPITER, JEAN R.
RESPONDENT/APPLICANT

CASE NO. A 73-356-897

IN REMOVAL PROCEEDINGS
VALRIE Y. ABRAHAMS, ESQ.

DECISION ON A MOTION
VIVIAN REYES, D.C.

A Motion TO REOPEN has been filed in the above captioned case. The Motion has been duly considered and it appears to the Court that:

( ) The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be GRANTED.

(✓) The Motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant its grant. Therefore, IT IS ORDERED that the Motion be and the same is hereby DENIED.

( ) Request is untimely; application was due on _____. Counsel should have filed in timely manner. However, an extension of time to file until _____ will be granted. No further extension will be approved.

( ) The is requested because MTR. Jupiter the requested Spouse is US and is SUCH HE is NOW ELIGIBLE for adjustment of status in the US as per Limitations explained to his in Open Court on 7/29/98

IRMA LOPEZ DEFILLO
IMMIGRATION JUDGE
Date signed: 5/19/98

cc: District Counsel
Counsel for Respondent/Applicant
Respondent/Applicant

Marriage Certificate

STATE OF GEORGIA COUNTY OF COBB

This Certifies that JEAN RONY JUPITER

and TRACY EUGENIA ANNETTE BRIGGS were united in

MARRIAGE

by C.H. ALEXANDER, PASTOR

on the 28TH day of AUGUST, in the year of our Lord, 1999

As appears of record in my office in Marriage Record Book 1999

Page 3011 This 30TH day of SEPTEMBER, 1999

David A Dodd

CLERK OF COURT, SUPERIOR COURT, MARIETTA, GEORGIA

Appendix C